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March 27, 1980

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Mr. Frank Carlucci
Central Intelligence Agency
Washington, D.C. 20505

Dear Frank:

This is merely to confirm our telephone conversation of last week. I hope that you or Stan Turner can be our guest speaker for the dinner on June 26th at The University of Chicago Law School.

The other options are for lunch on either June 27th or 28th.

Best regards.

Sincerely,

Morris I. Leibman,
Chairman

MIL/dm

AMERICAN BAR ASSOCIATION
CONFERENCE ON INTELLIGENCE LEGISLATION
CHICAGO --- 26 JUNE 1980

I am pleased to be with you this evening -- here in America's heartland. The debate on intelligence legislation necessarily revolves around the seat of our highest political institution in Washington. But the goal of our efforts must be to effectively serve the need for security and simultaneously protect the fundamental legal values of our citizenry nationwide. The intelligence agencies are instruments of our foreign relations. In this sense we truly have a national constituency, embracing all sectors of the populace. Therefore, I find it very fitting that this conference take place against the backdrop of the city that has come to represent a crossroad of this country's strengths -- industrial, agricultural -- and intellectual.

But it would be well to remind yourselves periodically over the next few days while you are at this conference that we are here surrounded by the quintessential America. We have come to an understanding of what this country means

after 200 years. But the United States is not the world. And what is discussed during these proceedings -- while of great importance to this country -- will not change the world that exists outside our borders. I am interested in that point because the intelligence agencies serve this country primarily outside its boundaries and take as their focus the other societies with which we share this globe.

Let me develop that point just a bit further with an illustration. Not so long ago I was traveling in one of the rapidly developing African countries. On this occasion I was in the company of three very distinguished members of the United States Congress. We were honored to be received by the Chief Executive of that country. During our discussions, a lady came into the room and was introduced to us as the wife of the President. Shortly after we had resumed our discussions another lady entered the room. She was introduced as the wife of the President. Perhaps sensing a slight awkwardness on the part of his American guests, our host graciously took time out to explain something about his country and his position. He explained that it was not unusual -- in fact rather traditional -- for a man occupying a high and powerful station in his society to have many wives. He went on to explain

further that the reason he only had two was that he was a Catholic.

We have a great country. But our values and practices simply do not apply worldwide. The intelligence agencies must operate worldwide --- in a milieu in which normal standards do not apply.

The strangeness of the intelligence world becomes apparent with just a little thought. Much of our nation's intelligence collection activity goes forward in disregard of foreign law. There is a certain paradox here. We sometimes seem to have an obsessive interest in legalisms when structuring the environment in which our intelligence agencies must live as a part of our American government and society. Many times our absorption in this endeavor seems so intense that we become blind and block out the reality that the intelligence agencies often operate in contravention of foreign law.

There is a good deal of information that the United States must have to function as a great power. Much of this information would be denied to us by our adversaries if they could. It is the job of the intelligence agencies to come up with this information irrespective of the wishes -- or the laws --- of foreign powers. We engage in espionage and recruit foreign nationals to engage in acts their own governments would consider treasonous if discovered.

I make no apologies here. I see no alternative to the United States collecting intelligence or otherwise acting clandestinely irrespective of the laws of other countries. But the puzzle remains of how we sanction this within our own carefully drawn framework of legal provisions. The approach of the National Security Act of 1947 was to say in effect "Do the necessary." I don't really see how we can become much more specific on this point in current legislation. But it is important that all of us involved in drafting such legislation keep in mind that we are preparing a charter for activity inherently antagonistic to the interests of other countries -- and often violative of their laws.

There is another element of the strangeness of the intelligence world that I will remark on here. It is seldom understood. It is a traditional "good" of our system that the functioning of government be open to all. We are in fact an open society to a degree unique to the world. However, in the intelligence business, openness is destructive. Secrecy is imperative.

The openness in our society draws its strength from many sources --- sources that are fundamental to our way of life. Openness is a necessary concomitant to democracy. Citizens must to some degree have an idea of what the govern-

ment is doing before they can participate effectively in their government through democratic processes.

We are also impelled toward openness by the role and special protection of the press under the First Amendment. The press is unfettered in its pursuit --and in its judgment -- of what to publish. I think we all agree that this is a fundamental strength of our system -- despite the fact that in the intelligence arena the process sometimes takes on the coloration of a game. If you can get it you can publish it -- even though the points scored on the publication side may be far outweighed by the damage done to our overall interests as a nation.

We must also recognize that part of the current emphasis on openness is due to public skepticism and distrust of government in the post-Vietnam, post-Watergate era. The era of investigations, we all know, included a long, critical look at CIA and the Intelligence Community in general. All the errors and questionable judgments of 25 years were brought together and publicized in a manner tending to make the Agency look like a "rogue elephant." Though this description was later disclaimed, I am afraid the retraction did little to counterbalance the effect of the initial headlines.

But having acknowledged the tremendous forces behind the thrust toward openness, I shall say again that secrecy in the conduct of intelligence activities is absolutely imperative. The effects of being compelled to disclose to too wide an audience too many details of our intelligence operations are seriously damaging. Experience has shown that wide dissemination of sensitive information correlates very highly with the appearance of mysterious leaks. I can't emphasize too much the inevitably damaging results of our inability to control leaks. We are creating the impression of ineffectiveness among our friends abroad. You can't win respect while projecting an image of being unable to protect legitimate secrets.

This tarnishing of our image has led inexorably to a loss of cooperation by our friends abroad. To them the logic seems inescapable. If we can't protect ourselves, we are less likely to protect them. I can tell you from my own experience that we have lost valuable sources of information because we could not guarantee that certain sensitive information would be safeguarded within CIA and not given wider dissemination. Anxiety levels tend to skyrocket when we must acknowledge to potential sources that even very detailed information tending to identify them as a source might wind up in the legislative forum, subject to the strains of

partisan views. When involved in a high-stakes game, no one wants to deal with a partner not in control of his end of the deal.

I said a moment ago that because of the world in which the intelligence agencies must operate, the norms of our society often do not apply. I now suggest that the standards of our society have not remained constant, but instead have changed significantly over time.

We have evidence for this in the propensity of some to apply retroactive morality and cite a presumed legal base for it. The intelligence agencies have experienced the phenomenon of people perceiving in the '70's what it then seemed like a good idea for the law to have been in the '50's and '60's. "The law" is often in the eyes of the beholder. In too many instances comments have been glibly made that CIA acted illegally when in fact the points of law involved have been sharpened only in recent years --and then after considerable debate.

For example there are those who see the law very clearly in retrospect who are quick to proclaim that the retention by CIA of information of a counterintelligence nature on U.S. persons was "illegal," and violative of constitutional rights. The conclusion is readily reached despite the fact that CIA has counterintelligence responsibilities and that the retention of the same information by

other agencies does not present a problem. Actually, sorting this one out -- the retention of information on U.S. persons -- has proven to be a rather complicated matter -- despite the simplicity of terms in which "the law" was previously perceived by some. It has now been made clear that CIA may act only in cooperation with the FBI in connection with the collection of counterintelligence information within the United States. Also, there is now a 17-page Attorney General procedure governing the collection, storage and dissemination by CIA of information concerning the activities of U.S. persons.

The point inherent in this is that times have changed. Despite our problems with retroactive application, the changes wrought in the last ten years cannot be ignored. Nor would we want to. Believe me when I tell you that the intelligence agencies have no interest in going back to the past. On the contrary, we want to focus on the future. We welcome legislation that will lay down broad guidelines for our activities. This would be quite helpful.

But as we proceed toward this goal some curious concepts have emerged. Some seemed to hold the view that it was important to reduce every detail, and the specifics of every concern, to statutory form. As it was introduced in February 1978, S.2525 was 273 pages long.

It contained provisions establishing the organization of the Intelligence Community under a Director of National Intelligence, with separate titles covering organizational and housekeeping matters for the Central Intelligence Agency, the National Security Agency and the intelligence division of the FBI. It also contained a profuse array of prohibitions, restrictions and reporting requirements. There were separate requirements to report specific decisions, approvals or operations, as well as a general all-purpose provision to give the Congress total access to information in the possession of the intelligence agencies.

Let me illustrate by recalling for you one particular provision. There was a provision in the bill that specifically prohibited the United States Government from covertly taking action likely to lead to flood, pestilence, plagues or mass destruction of property. At the time, the tongue-in-cheek suggestion went around at the Agency that we should oppose this provision on the basis of wanting to keep our options open. But behind the amusement the sting was felt. The bill had a readily perceptible punitive tone to it. It was clearly an overreaction. It is not necessary to put every conceivable detail in statute.

Another curious concept that has arisen is that, if you don't like the policy decisions that have been made, kill the instrument that implemented the policy. I have in mind here the Hughes Ryan Amendment dealing with covert action -- that is, operations in foreign countries for purposes other than solely to gain foreign intelligence. Now I daresay that there are certain covert action initiatives that we might all agree on. So it is not covert action per se that is the problem. However, the Hughes Ryan Amendment has made implementation of any covert action quite difficult. It has required a proliferation of information among too many committees and staffs in the Congress to permit confidence in maintaining the security of sensitive operations. I submit that placing a strangle hold on all covert action is not a sensible approach to take when the "evil" to be remedied is that the Congress has disagreed with certain covert action initiatives taken by the executive branch in the past.

Yet another curious concept that emerges when you examine the thinking of recent years is that CIA needs to be protected from Presidents. It is true that the most controversial initiatives in the history of our intelligence agencies tend to be those in which the President has taken a direct hand and ordered action. Here is where the lessons of

the past translated into realistic guidelines for the future can be helpful both to the intelligence agencies and the President. But the process can be carried to an extreme. Sometimes the implication seems to be that the intelligence agencies must act as a conscience or watchdog of the President. Perhaps it is that we have become a pawn in the escalating power struggle between the President and the Congress.

Despite the emergence of such curious concepts, however, we have managed to reach agreement on many of the large questions that once confronted us.

- The Central Intelligence Agency will continue. The Intelligence Community will be coordinated under the leadership of the Director of Central Intelligence.
- There is also agreement that the United States Government will maintain, and use as necessary, a capability for covert action. The covert action capability is to be housed in CIA. It appears that we will reduce the number of committees to which covert action information must be reported.

- It is acknowledged all around that CIA needs to protect the information it receives, though differences remain on how best to do this.
- There is certainly agreement that citizens of the United States must receive a full measure of protection of their constitutional rights vis-a-vis any intelligence agency activities which might impact those rights.
- There will be oversight. And it will be effective. It is required that Intelligence Community officials report any activities of questionable legality or propriety to the Intelligence Oversight Board. Throughout the year the intelligence agencies work quite closely with the Senate Select Committee on Intelligence and the House Permanent Select Committee on Intelligence. Sometimes the most traditional oversight mechanism is the best, and I don't mind telling you that Intelligence Community programs receive the closest possible scrutiny during the budget cycle.

I am happy to report that the foregoing points of agreement are now very much a part of Intelligence Community life. But critical questions remain. These questions will demand our close attention as the debate on intelligence matters unfolds.

- Yet unresolved is whether some sort of statutory right of access to information is needed for congressional oversight. Based on my experience dealing with the Congress, there is no need for special legislation of this nature. Some feel that legislation is necessary and that there can be no exemptions. I say that this would kill us. If there is to be such legislation, there must be exemptions for particularly sensitive sources and methods. At very least, the Agency, through its intelligence offices in the field, must be able to extend to potential sources the guarantee that the Agency will protect their identities.
- There are still details to be worked out regarding approvals for collection of information U.S. persons. We don't need very much U.S. person information, but we must be able to acquire what we do need. Actually I believe the debate over the supposed tension between civil liberties and intelligence collection is very much overdone. A person has to be engaging in activities giving rise to legitimate foreign intelligence or foreign counter-

intelligence interest before that person is likely to come to the attention of CIA. Let me remind you in this connection that foreign intelligence is defined by the Executive Order to include only information relating to the capabilities, intentions and activities of foreign powers, organizations or persons. Counterintelligence is defined to include only information gathered and activities conducted to protect against espionage and other clandestine intelligence activities, sabotage, international terrorist activities or assassinations conducted on behalf of foreign powers, organizations or persons.

With this focus, it tends to be the extraordinary U.S. person who comes upon the CIA screen. We might, for example, focus our attention on a key official in a foreign government who happens to be a dual national holding U.S. citizenship. As the world shrinks this becomes more common. The questions in this area tend to be of the threshold of approval. While we may not have perfection yet, the Attorney General procedure in this area shows the kind of balance that must be struck.

- Another significant issue in the yet unresolved category is the question of how much in the way of exemption from open government concepts shall be afforded the intelligence agencies. In its current form the Freedom of Information Act has a serious adverse impact as applied to the intelligence agencies. Thousands of man hours and millions of dollars are wasted in review of documents that are exempt from the Act but must be made the subject of detailed justifications in each case. Inevitably, there are errors.

We need an amendment to the Act that would make clear that its reach does not extend to raw intelligence data, or to information likely to reveal intelligence sources. Such an amendment would go far toward solving the most serious problem fostered by the FOIA -- the perception by our friends that we can't keep a secret.

- Yet unresolved also is the question of what form legislation should take aimed at the protection of our intelligence officers. I believe that some form of identities legislation is required. No responsible person can defend the type of exposures made by Covert Action Information Bulletin and similar

publications aimed at undercutting our intelligence effort by exposing employees of the intelligence agencies world-wide. The question is how best to deal with such challenges without infringing on First Amendment rights. We think it can be done.

The foregoing are all issues that you will be debating over the next few days. We will study your deliberations with interest.

Let me spend a minute, however, to give you as non-lawyer's appreciation of what is at stake. The '80's could be the most difficult period in our country's recent history, and a great deal of the burden must fall on the intelligence agencies.

The United States is finding itself in a new role in the '80's. It is not interventionist. It is not isolationist. Its vital national interests are increasingly entwined with developments in all parts of the world. As we engage in a high stakes balancing act, correct and timely intelligence becomes more important than ever.

Our adversaries are not resting. As a percentage of Gross National Product the Soviets have been adding to their military base at a rate approximately double that of the United States. Soviet commitments to the military

sector have been increasing every year. As a result, U.S./Soviet forces are more in balance than ever before. The ramifications of this for intelligence are profound. There is less of a margin for error. In this environment we must succeed in acquiring very good intelligence regarding both capabilities and intentions.

It is not reasonable to expect that even the Soviets would embrace the horrors of nuclear war as a deliberate choice. However, Soviet leaders may see themselves able to take greater advantage of opportunities that are presented to them where the threat to U.S. interests is apparently marginal. They may see themselves as free to undertake more Afghanistans and Ethiopias. In their view, when U.S. vital interests are not directly challenged, their strategic power effectively neutralizes that of the U.S. and leaves them freer to exploit their overwhelming strength in conventional forces. The 80's are likely to hold a succession of challenges.

It is no longer possible to speak of the Third World without rolling in the cost of energy and the overall scarcity of resources into one volatile mass of problems necessarily involving Europe and the United States. One must recognize that upper tier and lower tier Third World countries will have interests that continue to diverge.

The European economy as a whole is likely to grow stronger relative to that of the United States, with the Europeans moving out on a more independent course. No part of the world will be immune from the turmoil that is the predictable result of elevated expectations that are impossible to fulfill because of scarcity of resources.

During the period to come, intelligence could just make that crucial margin of difference. There are those who think that the paramount threat comes from within -- from excesses of our own institutions. As one who has lived in a number of states where there has been a drift toward authoritarian forms, I appreciate the danger. But I have also seen Soviet expansionism at work. And the danger is no less real.

What we are talking about are not really tradeoffs. We can certainly accommodate concerns on both sides of intelligence issues if we can control our emotions and channel our intellects. Lawyers are the dispassionate element in American society. We need your help.

The tools of the profession here assembled are those of law. Thanks to the richness of the American legal system there are a variety of measures that can be seized upon to work our will. And thanks to the constitutional framework of that system the levers and gears of our self governance are never very far away.

While the tools are there in profusion, it must take the wisdom of the law to ensure that the measures applied stimulate good health --- without permitting abnormal growths or flooding the system with toxic "medicines". Lawyers know well that the cry "There ought to be a law!" takes us only to the starting point of inquiry.